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Supreme Court of the United States

October Term, 1936

BOURJOIS, INC.,
Appellant,
vs.
CLYDE R. CHAPMAN, GEORGE W. LEADBETTER and GEORGE H. COOMBS,
Appellees.

No. 534

BRIEF FOR APPELLANT

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October Term, 1936

BOURJOIS, INC., *Appellant,* vs. CLYDE R. CHAPMAN, GEORGE W. LEADBETTER and GEORGE H. COOMBS, *Appellees.*	No. 534

BRIEF FOR APPELLANT.

The opinions herein have not been reported. They are found in the Record, pages 41-54.

This is an appeal by the plaintiff, Bourjois, Inc., a New York corporation, from a final order and decree (R. pp. 59 and 60) of the United States District Court for the District of Maine, Southern Division, entered October 7, 1936, and denying an interlocutory injunction unto the plaintiff, and finally dismissing the complaint herein. The petition for appeal and the assignment of errors were filed on October 15th, 1936 (R. p. 60 and p. 62), and said appeal was duly allowed on October 20th, 1936 (R. p. 61).

The bill of complaint (R. pp. 3-15) was filed against Clyde R. Chapman, the Attorney General of the State of Maine, against George W. Leadbetter who is the Commissioner of Health and Welfare of the State of Maine and against George H. Coombs, who is the Director of Public Health of the State of Maine. Said defendants are citizens of the State of Maine. Said bill of complaint was filed in

order to secure a temporary injunction and a permanent injunction, restraining the defendants from enforcing a certain statute which went into effect on January 1st, 1936, and which is entitled "An Act for the Regulation of Cosmetics". A full copy of the statute is set forth in this brief (*infra*, p. 3).

A motion was made for an interlocutory injunction by the plaintiff, pursuant to Section 380 of Title 28 of the United States Code.

This motion was heard wholly upon testimony and depositions, and without the use of any affidavits. As appears from the final decree herein (R. pp. 59 and 60), it was duly stipulated that the order of the Court, on plaintiff's motion for interlocutory injunction, should also be the final order or decree in this cause.

It was duly pleaded in paragraph 3 of the complaint (R. pp. 4 and 5) that the matter in controversy exceeded, exclusive of interest and costs, the sum or value of three thousand dollars, and that there was diversity of citizenship between the parties, and that this suit arose under the Constitution of the United States of America, and under the Constitution of the State of Maine. These jurisdictional allegations were duly admitted in the answer (R. p. 16, par. 3).

Finding of Fact No. 8 (R. p. 55) and Conclusion of Law No. 1 (R. p. 58) duly state that the existence of the statutory amount in issue has been conceded in the pleadings, and that the plaintiff has offered sufficient proof to establish the existence of the statutory amount.

Plaintiff's place of business has always been located in New York for at least ten years, and it has always conducted its business in Maine, by selling to local dealers, in interstate commerce (Findings of Fact Nos. 11-14, R. pp. 55 and 56).

Statement of the Case.

The statute in question (Chapter 109 of the Public Laws of 1935 of the State of Maine) is as follows:

"STATE OF MAINE

CHAPTER 109

PUBLIC LAWS OF 1935

AN ACT for the Regulation of Cosmetics.

Sec. 1. Registration of cosmetics. On and after January 1, 1936, no person, firm, corporation or co-partnership shall hold for sale, sell, offer for sale, in intra-state commerce, give away, deal in, within this state, supply or apply in the conduct of a beauty shop, barber shop, hairdressing establishment or similar establishment, any cosmetic preparation unless the said preparation has been registered with and a certificate of registration secured from the department of health and welfare.

Sec. 2. Department of health and welfare authorized to issue certificate of registration. The said department is hereby authorized to issue and shall issue a certificate of registration to the manufacturer, proprietor, or producer of any cosmetic preparation on the payment of an initial registration fee of 50¢ per preparation, which certificate shall be renewed annually on or before the first day of January in each succeeding year on the payment of a fee of 50¢.

The said department is authorized to regulate or to refuse the issuance of certificates of registration or to prohibit the sale of cosmetic preparations which in its judgment contain injurious substances in such amounts as to be poisonous, injurious or detrimental to the person. Temporary certificates of registration may be issued by said department for any preparation pending investigation of the same.

The department is hereby authorized to make such regulations as may be necessary for carrying out the purpose of this act to safeguard the public health.

Fees received under the provisions of this act shall be used by said department for carrying out the purposes of this act.

From the refusal of said department to issue a certificate of registration for any cosmetic preparation appeal shall lie to the superior court in the county of Kennebec or any other county in the state from which the same was offered for registration.

Sec. 3. Definition. "Cosmetic preparations" shall mean tonics, lotions, creams, powders, antiseptics, clays, bleaches, colors, dyes, or other substance used with or without mechanical or electrical apparatus to massage, cleanse, stimulate, manipulate, color, bleach, or otherwise to treat, improve or to beautify, the scalp, face, neck, shoulders, busts, arms, arm pits, hands, or to arrange, dress, curl, wave, cleanse, bleach, color or similarly treat the hair of any person, and shall include all shampoo preparations.

Provided, however, that household and toilet soaps shall not be held to be cosmetic preparations but shall be subject to the provisions of this act if such soaps are represented by the manufacturer or the producer thereof as a preparation for the treatment of disease.

Sec. 4. Permits issued under public laws, 1933, chapter 278. Permits issued under chapter 278 of the public laws of 1933 shall be considered to be permits issued under this act and shall remain in effect until June 30, 1936, without further payment therefor and may be renewed at the renewal rate provided unless such preparations are prohibited by this act.

Sec. 5. Cosmetic preparations kept or deposited for unlawful sale or use in this state are liable to forfeiture. Cosmetic preparations kept or deposited within the state intended for unlawful sale or use,

and the vessels in which they are contained, are contraband and are subject to forfeiture to the state unless they have been registered with the said department as prescribed in the preceding sections. Sheriffs, deputy sheriffs, police officers, state police officers and duly authorized agents of the said department, shall have the power to seize the same with or without process. In cases where cosmetic preparations are seized without a warrant said preparations shall be kept in some safe place for a reasonable time until a warrant can be procured.

Sec. 6. Duty of officer or duly authorized agent of the said department. When cosmetic preparations and vessels are seized as provided in the preceding sections the officer or duly authorized agent of the said department, who made such seizure shall immediately file with the magistrate before whom such warrant is returnable, a libel against such preparations and vessels, setting forth this seizure by him describing the cosmetic preparations, their vessels, and the place of seizure, and that they were kept or intended for unlawful sale and use in violation of law and pray for a decree of forfeiture thereof, and such magistrate shall fix a time for the hearing of such libel and shall issue his monition and notice of the same to all persons interested, citing them to appear at the time and place appointed to show cause why said preparations and vessels in which they are contained, should not be declared forfeited, by causing a true and attested copy of said libel and monition to be posted in two public and conspicuous places in the town or place where such preparations were seized, 10 days at least before said libel is returnable.

Sec. 7. Forfeiture in case no claimant appears; proceedings when claimant to be admitted as a party. If no claimant appears, such magistrate shall, on proof of notice as aforesaid, declare the same to be forfeited to the state. If any person appears and

claims such preparations, or any part thereof, as having a right to the possession thereof at the time when the same were seized, he shall file with the magistrate such claim in writing, stating specifically the right so claimed, the foundation thereof, the items so claimed, the time and place of the seizure and the name of the officer or duly authorized agent of the said department by whom the same were seized, and in it declare that they were not so kept or deposited for unlawful sale and use, as alleged in said libel and monition, and also state his business and place of residence, and shall sign and make oath to the same before said magistrate. If any person so makes claim, he shall be admitted as a party to the process; and the magistrate shall proceed to determine the truth of the allegations in said claim and libel, and may hear any pertinent evidence offered by the libelant or claimant. If the magistrate is, upon hearing, satisfied that said preparations were not so kept or deposited for unlawful sale or use, and that the claimant is entitled to the custody of any part thereof, he shall give him an order in writing, directed to the officer or duly authorized agent of the said department having the same in custody, commanding him to deliver to said claimant the cosmetic preparation to which he is so found to be entitled, within 48 hours after demand. If the magistrate finds the claimant entitled to no part of said preparation he shall render judgment against him for the libelant for cost, to be taxed as in civil cases before such magistrate, and issue execution thereon, and shall declare said preparation forfeited to the state. The claimants may appeal and shall recognize with securities as on appeals in civil causes from a magistrate.

Sec. 8. Constitutionality. If any section or part thereof, of this act, shall be declared unconstitutional it shall not affect the constitutionality of the remaining parts of this act.

Sec. 9. Exceptions. Any preparation or preparations purchased prior to the effective date of this act shall not be subject to the provisions of this act, provided that satisfactory evidence is presented that purchase was made prior to the effective date of this act, and further provided that such preparation or preparations are not prohibited by this act because they contain ingredients that are poisonous, injurious or irritating.

Sec. 10. Penalty. Any person, firm or corporation that violates any provision of the preceding sections, or any ordinance, or by-law, or regulation made thereunder, shall be punished by a fine of not more than $100.

All fines, forfeitures and costs collected under this act shall be paid to the county as provided by chapter 148 of the revised statutes.

Sec. 11. Repeal. Chapter 278 of the public laws of 1933 is hereby repealed."

Statement of Proceedings.

The original bill of complaint (R. pp. 3-14) was filed on December 7th, 1935.

A motion for preliminary injunction was duly made, and this motion was denied in an opinion dated February 19th, 1936 (R. pp. 41-44), without prejudice (Finding of Fact No. 4, R. pp. 54 and 55).

Defendants then began to enforce the statute against plaintiff's preparations, by arresting local dealers and by making seizures.

Findings of Fact Nos. 9, 10, 16, 17, 21 (R. pp. 55 and 57), are as follows:

"9. Subsequent to January 1st, 1936, the defendants have enforced and have intended to enforce said Chapter 109 of the Public Laws of the State of

Maine by seizing cosmetic preparations put out by the plaintiff, and not registered in the State of Maine pursuant to said Chapter 109 and offered for sale in intrastate commerce within the State of Maine by dealers located within the State of Maine.

10. Subsequent to January 1st, 1936, the defendants have enforced and have intended to enforce said Chapter 109 of the Public Laws of the State of Maine, by arresting said dealers located within the State of Maine and engaged in intrastate commerce within the State of Maine, and who have sold in said intrastate commerce the cosmetic preparations of the plaintiff, which have not been registered pursuant to said Chapter 109.

16. Since the plaintiff has refused to register its cosmetic preparations under said Chapter 109, many wholesalers and retailers who have their places of business located within the State of Maine and who are engaged in selling cosmetic preparations in intrastate commerce within the State of Maine, have refused to order plaintiff's unregistered cosmetic preparations for sale in intrastate commerce within the State of Maine.

17. Unless it registers its cosmetic preparations, the enforcement of said Chapter 109 will put to an end a business which the plaintiff and its predecessors have conducted with wholesalers and retailers in the State of Maine for at least forty years.

21. Said Department of Health and Welfare notified plaintiff that it must register under said Chapter 109 if it wished to have its cosmetic preparations sold within the State of Maine."

Attention is called in particular to Finding of Fact No. 21, in which it is stated that the defendants notified the plaintiff itself, as distinguished from any of the dealers handling plaintiff's preparations within the State of Maine

in intrastate commerce, to register and to pay the fees required by the statute.

These findings were not objected to by the defendants, and they are amply supported by the interrogatories and the answers thereto (R. pp. 30-41), and by the evidence (R. pp. 81-96; p. 170, fol. 257; p. 73, fol. 130).

Assignment of Errors.

1. The Court erred in denying an interlocutory injunction and a permanent injunction suspending or restraining the enforcement, operation or execution of Chapter 109 of the Public Laws of 1935 of the State of Maine.

2. The Court erred in holding that said Chapter 109 was not in violation of the Constitution of the United States of America.

3. The Court erred in holding that said Chapter 109 of the Public Laws of 1935 was not in violation of the Constitution of the State of Maine.

4. The Court erred in holding that said Chapter 109 was an inspection law.

5. The Court erred in holding that the State of Maine could compel the plaintiff to apply for a certificate or certificates of registration under said Chapter 109.

6. The Court erred in holding that the State of Maine could compel the plaintiff to pay the fee specified in said Chapter 109 for securing a certificate of registration or the renewal thereof.

7. The Court erred in holding that the State of Maine had any power to compel the plaintiff to pay any fee or fees to be used by the Department of Health and Welfare of the

State of Maine for carrying out the purposes of said Chapter 109.

8. The Court erred in holding that the State of Maine had the authority to compel the plaintiff to do anything or to make any payment as a condition precedent to the sale of plaintiff's products in intrastate commerce in the State of Maine.

9. The Court erred in not holding that the fees specified in said Chapter 109 could be exacted only from the vendor of the cosmetic preparations specified in said Chapter 109, who was selling said cosmetic preparations in intrastate commerce in the State of Maine, or from the person who was holding the same for sale, or was offering the same for sale, in said intrastate commerce.

10. The Court erred in not holding that said Chapter 109 was a registration law, as distinguished from an inspection law.

11. The Court erred in holding that the State of Maine could require a fixed payment per cosmetic preparation from the plaintiff or any other person in order to secure a certificate of registration under said Chapter 109, or a renewal of said certificate.

12. The Court erred in not holding that said Chapter 109 was an unlawful and unconstitutional burden on interstate commerce between the several states of the United States of America.

13. The Court erred in holding that the "original package" doctrine did not extend to the instant case.

14. The Court erred in not holding that the State of Maine must install an accounting system so as to separate the expenses required in administering said Chapter 109

with reference to cosmetic preparations produced outside of the State of Maine and shipped in interstate commerce to and within the State of Maine, from the expenses required in administering said Chapter 109 with reference to cosmetic preparations produced within the State of Maine and sold within the said state in intrastate commerce, and without ever having been shipped outside of the State of Maine.

15. The Court erred in not holding that the State of Maine must install an accounting system so as to separate the expenses required in administering said Chapter 109 relative to beauty shops, barber shops, hair dressing establishments or similar establishments located within the State of Maine, as distinguished from the expense of administering said Chapter 109 relative to cosmetic preparations manufactured outside of the State of Maine and shipped to the State of Maine in interstate commerce.

16. The Court erred in holding that the plaintiff had to offer any evidence in order to show that the fees fixed by said Chapter 109 were excessive.

17. The Court erred in not holding that the search and seizure provisions of said Chapter 109 were contrary to the Constitution of the United States of America and contrary to the Constitution of the State of Maine.

18. The Court erred in not holding that said Chapter 109 was contrary to the Constitution of the United States of America and of the State of Maine, in that said Chapter 109 provides for the denial of a certificate of registration wholly as the result of *ex parte* proceedings.

19. The Court erred in not holding that said Chapter 109 was contrary to the Constitution of the United States and the Constitution of the State of Maine in that said Chapter 109 provides for the denial of the renewal of a

certificate of registration, wholly as the result of *ex parte* proceedings and without the right of review.

20. The Court erred in not holding that said Chapter 109 was contrary to the Constitution of the United States of America and the Constitution of the State of Maine in that said statute is discriminatory because it does not require the registration of household soaps and toilet soaps, unless such soaps were represented by the manufacturer or producer thereof as a preparation for the treatment of disease.

Summary of Argument.

It is conceded that a state has the power to prohibit the sale in intrastate commerce of foods and drugs which are a menace to public health. If the State of Maine had passed a statute prohibiting the sale of cosmetics which were poisonous or adulterated, according to standards specified in the statute itself, and without exacting any fees from out-of-state manfacturers who sold their products only in interstate commerce to dealers located within the State of Maine, an entirely different question would be presented.

Likewise, it is well settled that a state may pass a proper inspection statute, prescribing certain general standards of safety or purity in the statute, and to inspect the merchandise which arrives within the state for purposes of resale in intrastate commerce, in order to determine whether the merchandise conforms to the statutory standard, and to collect a reasonable inspection fee for this purpose from the dealer who offers the merchandise for sale within the state (*Savage* v. *Jones*, 225 U. S. 501). Such right of the state to pass an *inspection statute*, and the right to exact a fee in order to defray the expenses of inspection,

have been held to be based upon Article I, Sec. 10, Clause 2, of the Constitution of the United States of America (*infra*, pp. 33-35).

The Constitution expressly provides that the expense of executing a state insection law shall be defrayed by taxes in the nature of *imposts* or *duties* (*infra*, p. 32).

This means that an inspection fee must be charged, based wholly upon the quantity of merchandise to be inspected, as distinguished from a fixed fee, to be paid in advance, for each trade-mark which is affixed to the merchandise by the out-of-state manufacturer.

The inspection fee must be collected wholly from the dealer who sells the merchandise within the state, and not from the out-of-state manufacturer who sells to the dealer only in interstate commerce, so that the merchandise is the property of the dealer when it arrives within the state. Let us assume that plaintiff insisted that dealers in Maine should call for their purchase at plaintiff's place of business in New York, so that physical delivery was made in New York to the dealer's truck. Even then, plaintiff would be compelled to pay for the cost of registering the merchandise in Maine, if it wished to have its merchandise sold within the State of Maine.

The statute in question is therefore a registration statute and not an inspection statute. It is an absolute delegation of the legislative power to the Department of Health and Welfare, leaving to "*its judgment*" (Sec. 2 of the statute, *supra*, p. 3) the right to deny certificates of registration for cosmetic preparations.

The inspectors do not have the right to visit the premises of dealers in order to take samples of cosmetics, and to have said samples analyzed for purposes of comparison

with a statutory standard, as provided in all inspection laws which had been sustained (*Savage* v. *Jones*, 225 U. S. 501).

On the contrary, the inspector must go to the place of business of a dealer like any customer, and buy samples of cosmetics at the full price of the dealer, thus paying a profit to the dealer. This sample is then compared with the certificate of registration and any variation between the sample and the certificate of registration forthwith subjects the dealer to the forfeiture of his merchandise and to fine and imprisonment. It is impossible for the dealer to defend himself by showing that the merchandise is absolutely pure and harmless. The out-of-state manufacturer, who sells to dealers outside of Maine, must pay a registration fee, so that the dealer can profit by selling to the inspector.

The statute is therefore not an inspection statute, of the type permitted by the Constitution of the United States, as interpreted by all previous decisions. Likewise the statute in question gives to the Department, which is a branch of the Executive, absolute and capricious *ex parte* authority to deny a certificate, to deny the renewal of a certificate, or to prohibit the sale of merchandise during the term of a certificate, without granting any hearing and without right of review.

The statute is also unconstitutional because it provides for seizure and forfeiture of merchandise, without trial by jury.

It also imposes a uniformity of manufacture which is commercially impossible and which is not necessary to protect the public.

In all of the above points, the statute violates the Constitution of the United States of America and of the State of Maine.

The authorities cited by the District Court (R. pp. 44-54) relate wholly to the right of a state to exercise its police power by forbidding the sale of merchandise which does not comply with definite statutory requirements.

Likewise the record shows that the fees which the state has attempted to exact from the plaintiff, and from other out-of-state manufacturers who do no business whatever in intrastate commerce in the State of Maine, have been applied by the state for enforcing local statutes other than the statute in issue. The state has not established any regulations or any system of accounting whereby it can be ascertained whether the fees are reasonable, and whether such fees have been and will be devoted wholly to executing the statute in issue.

It is well settled that even where a state has the right to pass a proper inspection law, the state must install a system of accounting, whereby the persons who pay the inspection fee can determine whether or not the inspection fees are in excess of the amount necessary for reasonable enforcement of the inspection law. If a state does not establish such a system of accounting, the burden is upon the state to prove that the inspection fees are reasonable, and that such fees are devoted wholly to executing the inspection statute.

In the absence of the installation of such an accounting system by the state, the presumption is that the fees are unreasonable and in excess of the constitutional right of the state.

Plaintiff has the right to object to a statute which will prevent the continuance of its business with its dealers, even if the state exerts its authority wholly upon the intrastate business of said dealers (*Savage* v. *Jones*, 225 U. S. 501; *George H. Lee Co.* v. *Webster*, 190 Fed. 353).

ARGUMENT.

Analysis of the Statute.

Section 1 applies to cosmetics manufactured within the state by persons who conduct beauty shops, barber shops, hairdressing establishments or the like, and who make up their own tonics or face-creams or the like.

The act is expressly limited to persons who conduct,

> "a beauty shop, barber shop, hairdressing establishment or similar establishment",

where a personal service is rendered, as distinguished from a mere dealer. It cannot apply to plaintiff.

As later pointed out herein, no attempt has been made to segregate the expense of inspecting merchandise manufactured and sold wholly within the state, from merchandise manufactured outside of the state and sold to local dealers in interstate commerce.

Section 2 of the statute gives the Department of Health and Welfare the authority to issue a certificate of registration for each cosmetic preparation, on the payment of an initial registration fee of 50¢ per preparation. Each certificate for each preparation must be renewed annually upon the payment of an additional fee of 50¢ per preparation.

Section 3 of the statute does not include *perfumes*. Nevertheless if two face powers are identical in composition, save that they contain different perfumes, a separate certificate of registration is required (opinion of the Attorney General, R. p. 39, fol. 73).

Likewise under this opinion, if two face powders are identical in composition, save that they contain different amounts of the same coloring matter, the face powder which contains the lesser proportion of coloring matter must be separately registered, even though it cannot possibly be

more injurious than the preparation which contains the greater proportion of coloring matter.

The first paragraph of Section 2 provides that the certificate of registration shall be issued to and the fees shall be paid by "the manufacturer, proprietor, or producer of any cosmetic preparation". The defendants have construed this statute by demanding that the plaintiff file application for the certificate and pay the fees required by the law (Finding of Fact No. 21, R. p. 57; R. p. 170, fol. 257), although it never sells its products, or offers them for sale, within the state.

Irrespective of the practical construction of the statute by the defendants, they had no discretion in the matter because since plaintiff manufactured its own preparations, then, if the statute applied to plaintiff, the statute required that plaintiff (and no other person) must file application for the certificates of registration and pay the statutory fee. The word "proprietor" which is found in the first paragraph of Section 2 of the statute was intended to refer to concerns which applied their own trade-marks, to preparations manufactured for such concerns by commercial laboratories.

The statute uses the word "proprietor" in the *singular* form.

Only a single fee is required by the Maine law for each registration. The evidence disclosed that there were many druggists and other retailers located within the State of Maine, who have sold plaintiff's preparations in intrastate commerce, and no single retailer could be the "proprietor" within the meaning of the statute.

The word "proprietor" was taken from the copyright and trade-mark statutes in which said word is used to designate the exclusive owner of the copyright or trade-mark (*Yuengling* v. *Schile*, 12 Fed. 97 on p. 105).

In Black's Law Dictionary (1910), page 958, the word "proprietor" is defined in part as follows:

> "A person entitled to a trade-mark or a design under the acts for the registration of trade-marks and designs is called 'proprietor' of the trade-mark or design."

The second paragraph of Section 2 gives the Department unlimited and arbitrary and capricious *ex parte* power to deny a certificate of registration. No provision is made for a hearing or for the taking of testimony.

If the Department believes that a certain face powder is injurious, it may deny a certificate without a hearing, even though this is contrary to unanimous medical opinion. The applicant for registration cannot even take testimony before the Department to prove that the *ex parte* analysis made by the Department is erroneous.

The Department is not even required to notify the applicant of the reason for rejecting an application for registration.

The record shows how important it is to provide for a hearing and the taking of testimony.

While no criticism of any kind has been made of the products of the plaintiff, Dr. Campbell, who is an official of the State of Maine, testified that certain cosmetics made by manufacturers other than the plaintiff were injurious, because such cosmetics contained arsenic and other objectionable ingredients (R. p. 133, fol. 211).

Upon cross-examination it appeared that Dr. Campbell had referred to a hair tonic which contained arsenic trioxide in the proportion of five thousandths of one per cent. (R. p. 137, fol. 216, last question and answer).

Upon further cross-examination, Dr. Campbell conceded that he could not refer to a single textbook or authority which stated that this minute percentage of arsenic trioxide

would be injurious in a hair tonic (R. p. 138, last question and answer).

It then appeared that under the rulings of the Department of Agriculture, it was permissible to sell a *food* which contained five thousandths of one per cent. of arsenic trioxide (R. p. 140, fol. 219, first question).

Mr. Fuller (plaintiff's expert) then testified without contradiction that commercial glycerin contained as much as five thousandths of one per cent. of arsenic trioxide and that this minute percentage of arsenic trioxide did not make the glycerin objectionable for external use (R. p. 150, fol. 231).

These facts show how important it is to have the right to a hearing, instead of an *ex parte* analysis. The analysis of cosmetic preparations is very difficult and uncertain (R. pp. 112-114).

It is recognized that a state may organize a quasi-judicial body to operate under certain statutory standards, but in all legislation of this type which has been upheld, it has been necessary to provide for a full *hearing* before the quasi-judicial body (*infra*, p. 40). This safeguard is wholly omitted in the Maine statute.

The failure of the statute to provide for a hearing is particularly objectionable, because the second paragraph of Section 2 of the statute gives the Department the right to refuse to issue certificates or to prohibit the sale of preparations,

> "which *in its judgment* contain injurious substances in such amounts as to be poisonous, injurious or detrimental to the person."

As pointed out in *State* v. *Burdage*, 95 Wisc. 390, the words "in its judgment" grant unto the Department,

> "an absolute delegation of the legislative power."

The Department even has the right to grant a certificate to one manufacturer for a certain face powder or the like, and to deny a certificate to a competitor for a product having the identical formula.

If application for registration is filed, the Department can consider such application *ex parte* for any period of time it desires, up to one hundred years and even more, even though the preparation may be a dusting powder identical in formula with that used in hospitals and specified in the Pharmacopoeia. Even if application for registration for the same formula has heretofore been granted to one concern, the Department can hold up the registration of a later applicant for an indefinite period of time.

The last paragraph of Section 2 of the statute provides that an appeal may be taken from the refusal of the Department to issue an *original* certificate. Since the statute does not provide for the taking of testimony or for proceedings in any form before the Department, the appeal would necessarily be futile.

Likewise since the Department can grant or deny certificates according to *"its judgment"*, there could not possibly be an appeal on an issue of fact. The only question on appeal could be as to whether or not the Department had exercised "its judgment". Even if there were a total lack of evidence to sustain the ruling of the Department, no appeal could be taken on any question of fact.

Certain statutes, such as the statute which has created the Federal Trade Commission (U. S. Code, Title 15, sections 41-51), have provided that the finding of the quasi-judicial body on an issue of fact shall be final, subject to judicial review, *if supported by testimony*. For example U. S. Code, Title 15, sec. 45 provides:

> "The findings of the commission as to facts, if supported by testimony, shall be conclusive."

The Maine statute goes far beyond any previous law of this type, because instead of specifying any standards, or requiring a hearing, the entire matter has been delegated to the *ex parte* judgment of the Department. Likewise Section 2 does not provide for a hearing or for any appeal, if the Department refuses to *renew* a certificate. The renewal of a certificate can be refused upon the last day of the term of the original certificate, wholly as the result of *ex parte* proceedings, and even without prior notice to the manufacturer, or to the retailers who are handling the merchandise in question within the State of Maine.

As soon as the renewal of the certificate is refused, the further sale of the merchandise becomes unlawful. The statute does not provide for any period of time for disposing of merchandise whose sale has previously been authorized by the grant of an original certificate, even though the *ex parte* refusal to renew the certificate may be capricious and contrary to unanimous medical opinion.

If the chemist of the Department makes a new *ex parte* analysis of a face powder for which an original certificate has been issued, and on such new analysis the chemist erroneously determines that he has discovered some injurious substance which was not discovered upon the original analysis, a renewal can be refused *ex parte*, even though the new analysis of the chemist may be wholly erroneous.

The Department is not even required to state its grounds for refusing an original certificate or for refusing to renew an original certificate.

Likewise the second paragraph of Section 2 gives the Department the right,

> "to *prohibit* the sale of cosmetic preparations which *in its judgment* contain injurious substances * * *."

Hence, even after the Department has granted an original certificate, and during the term of the original certificate, the Department can change its mind and prohibit the sale of the registered cosmetic. This prohibition can also be the result of capricious *ex parte* proceedings, without advance notice, and without giving the plaintiff an opportunity to fill orders on hand and without giving the retailers an opportunity to sell merchandise on hand, for which an original or renewal certificate has been granted.

No appeal is provided if the Department issues an *ex parte* prohibition against the sale of a cosmetic preparation during the term of an original certificate, or during the term of a renewal certificate.

Section 3 of the statute defines cosmetic preparations and by failing to include perfumes, it expressly excludes perfumes from the scope of the statute.

Nevertheless, the opinion of the Hon. Attorney General (R. p. 39, fol. 73) requires separate registrations and the payment of additional fees for cosmetic preparations of identical composition, if one is perfumed and the other is unperfumed, or if said identical preparations contain different perfumes.

The testimony shows *without contradiction* that perfumes cannot be harmful.

Mr. Bartholomew, a person of long experience, testified (R. p. 67),

> "I have never heard of a perfume being harmful in any manner whatsoever * * * I should say the perfumes are absolutely harmless and I think that I might say that could be a general statement as applied to perfumes."

The opinion of the Hon. Attorney General (R. pp. 39 and 40) also requires different registrations, if two prepara-

tions of identical composition have any difference whatever in color, or if the same preparation is sold under different trade-marks.

The absolute uniformity of manufacture which is required (R. p. 40), is an impossible requirement, because the testimony shows without contradiction that it is impossible to make one batch the same in color or in composition as another batch which is intended to be made according to the identical formula. Likewise there can be changes in coloring matter without the slightest possibility of irritation.

On page 68 of the record Mr. Bartholomew testified as follows:

> "The coloring matters used in the face powders would be insoluble pigments as well as some soluble colors, or you might say harmless soluble colors. In this connection the color percentages may range from 1 in 100,000 to 1 in 5,000,000, making a possibility of irritation impossible."

According to the ruling of the Hon. Attorney General, the Department may hold that a face powder which contains coloring matter in the proportion of one part of coloring matter to one hundred thousand parts of face powder is absolutely harmless. If so, the use of the same coloring matter in an even smaller proportion, such as one part of coloring matter to five million parts of face powder, must be necessarily even less harmful. Nevertheless, each and every variation in percentage of coloring matter requires a separate registration. It would be necessary to register every batch.

Mr. Fuller, an expert witness of long experience, testified without contradiction that it was impossible to make a face powder of absolute uniformity and that the variations would

necessarily run to two-tenths per cent. Such variation is within the limits permitted by the United States Pharmacopoeia (R. pp. 109 and 110, fols. 180 and 181).

Section 3 of the statute includes soaps, and the Hon. Attorney General has ruled that shaving soaps, for example, come within the statute (R. p. 40, fol. 75).

The expert testimony shows without contradiction that if soap is made according to the same formula, the batch of soap differs in composition throughout its mass, so that if a batch of soap is boiled in a kettle, the cakes of soap which are made from different parts of the same batch from the same kettle, will vary in composition by much more than one-tenth of one percent (R. p. 110, fols. 181 and 182).

Hence the statute is so severe as to be absolutely unworkable. If a certificate of registration is granted for a face powder, and the analysis of a sample which is secured from a retailer, shows a difference in percentage of coloring ingredient or of other ingredient from those specified in the original registration, no matter how minute and immaterial the variation may be, the retailer is subjected forthwith to the severe penalties prescribed by the statute, without the slightest opportunity of making a defense.

Sections 5-7 of the statute permit search and seizure without trial by jury.

Section 10 of the statute makes it a penal offense to violate any by-law or regulation of the Department, so that the legislature has in effect delegated to the Department the right to enact penal statutes.

The statute is not an *inspection* statute. It is a *registration* statute. The sole duty of the state officers is to prevent the sale of unregistered preparations. No general standard of purity or harmlessness is specified in the statute. In these respects, the Maine law is entirely different from the inspection laws which have been sustained.

The State of Maine cannot compel plaintiff to pay the costs of administering a local law. In particular it cannot compel plaintiff to pay for the cost of buying samples at retail, including a profit to the retailer.

Obviously, the State of Maine cannot tax the plaintiff, which is a New York corporation, and which does not sell anything in intrastate commerce in Maine. If the State of Maine would require the payment of any general tax by the plaintiff, as a condition precedent for the sale of plaintiff's products in intrastate commerce in the State of Maine, this would clearly be beyond the authority of the state. It is absurd to say that no interference with interstate commerce is committed, if the sale of plaintiff's products is prohibited in intrastate commerce. For forty years plaintiff has done a substantial business in the State of Maine, by selling its products only to retailers and wholesalers located within the State of Maine, for purposes of resale in intrastate commerce. Plaintiff has never done a direct mail order business with residents of Maine. If plaintiff's business with dealers is prohibited, and plaintiff is limited to a direct mail order business with individual residents of Maine, plaintiff's business is destroyed.

The test is stated in,

East Ohio Gas Co. v. *Tax Commission of Ohio*, 283 U. S. 465,

in which it was stated (p. 470):

> "It is elementary that a state can neither lay a tax on the act of engaging in interstate commerce nor on gross receipts therefrom. * * * it must appear that one engaged exclusively in interstate business would not be subject to the imposition, and that the taxpayer could discontinue the intrastate business without withdrawing also from the interstate business."

If the statute in issue is sustained, then a state could collect a tax from a company engaged in selling gas wholly in interstate commerce, by forbidding the use or sale of the gas within the state, unless a tax were paid by the out-of-state concern.

It does not make any difference that the tax which is sought to be collected from the plaintiff herein, may be devoted to a worthy purpose. If the State of Maine wishes to protect its citizens by a suitable health law, it must collect the expenses of administering the statute from its own dealers and citizens. In particular, it must take samples for the purposes of inspection from the dealers engaged in intrastate commerce within the state, and who own the merchandise, at the expense of said dealers. It is particularly objectionable to demand money from the plaintiff for the purpose of buying samples at full retail price from local dealers, thus giving the local dealer a profit at the expense of the plaintiff. There is nothing which people bear with such great fortitude as the taxes and the troubles of other people. The retailers within the State of Maine will welcome the visits of the inspectors, because every purchase of plaintiff's preparations will mean a profit to the retailer, and plaintiff will pay this profit.

A case exactly in point is found in,

George H. Lee Co. v. *Webster*, 190 Fed. 353.

This case involved a statute of Kansas, which required that each and every brand of concentrated feeding stuff should be registered, together with a statement of its ingredients. A fixed fee was charged for each brand registration. It was held that this was not an inspection law,

> "but is merely a fee exacted of complainant for registering the brand of goods offered by him. • • •

> the registration fee required by section 2 of the Act, insofar as complainant is concerned, is a tax on his right to engage in the business of selling his product to his customers in this state, and is therefore unconstitutional and void."

As in the instant case, the plaintiff, George H. Lee Co. was not a citizen of the state which had passed the so-called inspection law and said plaintiff sold its products to various dealers in the State of Kansas, in interstate commerce, and said dealers resold the same in intrastate commerce.

On page 355 of 190 Fed. the Court stated as follows:

> "It is evident, however, complainant has the right on compliance with all lawful demands of the state to bring his products within the state, and to there dispose of them to his customers without let or hindrance from the state, or its authorized agents, either through exactions made directly upon complainant in reference to such interstate business, or by interference with such business by the state indirectly through complainant's customers, to his injury and the detriment of such business. In Brown v. Maryland, 12 Wheat, 419, 6 L. Ed. 678, Mr. Justice Marshall, delivering the opinion said:
>
> > 'A tax on the occupation of an importer is, in like manner, a tax on importation. It must add to the price of the article, and be paid by the consumer, or by the importer himself, in like manner as a direct duty on the article itself would be made. This the state has not a right to do, because it is prohibited by the Constitution'."

In the case of,

> *Rosenberger* v. *Pacific Express Company,* 241 U. S. 48,

this Court invalidated a Texas statute which imposed,

> "a state license tax of $5000.00 annually on each place of business or agency of every express company where intoxicating liquors were delivered."

Even though the tax was not imposed upon the shipper, this Court held that such fixed fee was a burden on interstate commerce.

In statutes which have been sustained, as evidenced by the case of *Savage* v. *Jones*, the fee has always been based upon the amount of merchandise which was brought within the state, and which was sold or offered for sale within the state. Since the cost of inspection depends upon the amount of merchandise sold by dealers located within the state, it is unfair and unconstitutional to compel a manufacturer whose sales within the state are relatively small, to pay the same fee per preparation as another manufacturer whose sales per preparation may be very large. For example, plaintiff may do a small total business within the State of Maine, by selling ten thousand different preparations. Under the statute it must pay five thousand dollars per year. A competitor of the plaintiff may do a much greater total business within the State of Maine, by selling a single preparation. Even though the inspection of the competitor's merchandise will involve much greater expense than the inspection of plaintiff's merchandise, such competitor need pay only fifty cents. Likewise, a competitor of the plaintiff may do a very large business on a single preparation, and allow the retailer a tremendous profit, so that the retailer charges five dollars for a box of face powder which costs the retaiiler one dollar. Under the statute the inspectors of the state must pay the retailer his full retail price, thus using fees exacted from the plaintiff for the purpose of paying a retailer a handsome profit for selling a product of a competitor to the state inspector.

Unequal taxation of this type, even if permitted on other grounds, is unconstitutional (*Stewart Dry Goods Co.* v. *Lewis*, 294 U. S. 550).

If the statute is constitutional, then any state can place an unlimited number of its citizens upon the payroll, as inspectors or the like, without arousing its taxpayers, because the expenses and salaries will be collected from out-of-state manufacturers.

As pointed out in the case of *George H. Lee Co.* v. *Webster* (*supra*, p. 26), the exaction of a tax of this type, is similar to the imposition of an import duty.

The "original package" doctrine is sufficiently flexible to take care of this situation.

Baldwin v. *G. A. F. Seelig, Inc.*, 294 U. S. 511.

As appears from the decision of the District Court (7 Fed. Supp. 776), "Seelig" brought large original cans of milk into New York from Vermont. Some of this milk was sold in New York, in the original large cans which were brought into the state by "Seelig".

"Seelig" also bottled some of this milk in New York, and it sold the bottled milk to local customers in New York (7 Fed Supp. on p. 777). This was a clear breaking of the original package.

The New York Milk Control Act set up a system of minimum prices to be paid by dealers to producers. "Seelig" bought its milk from a creamery in Vermont at prices lower than the minimum prices which were required to be paid to producers in New York under the New York Act. Thereupon a license was refused to "Seelig" in New York, unless it agreed to conform to the New York statute and the regulations thereunder.

This Court held that New York had no power to project its legislation into Vermont.

It also held that "Seelig" had the right to sell the bottled milk, even though it was not sold in New York in the original can or package.

On page 526 this Court stated,

> "The test of the 'original package', which came into our law with Brown v. Maryland, 12 Wheat. 419, 6 L. Ed. 678, is not inflexible and final for the transactions of interstate commerce, whatever may be its validity for commerce with other countries.
>
> • • • • • • • •
>
> There are other purposes for which the same merchandise will have the benefit of the protection appropriate to interstate commerce, though the original packages have been broken and the contents subdivided.
>
> • • • • • • • •
>
> In brief, the test of the original package is not an ultimate principle. It is an illustration of a principle."

The principle set forth in the case of *Baldwin* v. *G. A. F. Seelig, Inc.*, has been followed in subsequent decisions, such as,

> *Langendorf United Bakeries, Inc.* v. *City of Reno*, 16 Fed. Suppl. 442,

decided on March 26th, 1936.

The Court held unconstitutional an ordinance of the City of Reno, which required inspection by the city food inspector of all bakery products sold in the city, insofar as this applied to bakery products which were made in California and which were shipped to Reno, and there sold only at wholesale by the plaintiff.

The Court stated,

(p. 442)

> "No showing has been made that plaintiff's products shipped by public utility or common carriers into the state of Nevada have been subject to unhealthy conditions or are unhealthy in fact."

(p. 443)

> "From the opinion in the Minnesota v. Barber case, supra, by Mr. Justice Harlan, we quote: 'It will not do to say—certainly no judicial tribunal can with propriety assume—that the people of Minnesota may not, with due regard to their health, rely upon inspections in other states of animals there slaughtered for purposes of human food.'"

Likewise in the instant case, there is absolutely no proof that the products of the plaintiff are injurious.

On the contrary the evidence shows without contradiction that the products of the plaintiff have conformed to all state and federal statutes, and that they have been pure and harmless in each and every respect.

(R. p. 69)

> "During my twenty years' connection with plaintiff no proceeding has ever been taken to my knowledge against the products of plaintiff by any governmental authority in the United States on the ground that these preparations are harmful."

As pointed out on pages 74 and 75 of the record, no complaint has ever been made by any state or by the Federal Government in the United States, relative to plaintiff's preparations. Only one complaint has been received during this period of forty years, because a woman applied the face powder so carelessly that the powder entered her eyes, so as to produce a natural irritation due to the presence of a large amount of powdered material. This irritation did not result from the use of an unsuitable ingredient.

The state does not have the constitutional power to exact a registration fee, as a condition precedent to the sale of merchandise within the state.

The power of a state to pass an inspection law is found by an analogy in the Constitution of the United States of America, Article I, Section 10, Clause 2, which is as follows:

> "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws; and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress."

Bowman v. *Chicago & N. W. Ry. Co.*, 125 U. S. 465.

This case involved an Iowa statute which forbade any railway company or other common carrier from bringing within the state any intoxicating liquors,

> "without first having been furnished a certificate from and under the seal of the county auditor of the county to which said liquor is to be transported, or is consigned for transportation, or within which it is to be conveyed from place to place, certifying that the consignee or person to whom said liquor is to be transported, conveyed, or delivered is authorized to selling such intoxicating liquors in such county."

Any common carrier which violated this statute was subject to a penalty of one hundred dollars for each offense,

The defendant railway company refused to accept intoxicating liquors for delivery within the State of Iowa, in the absence of the certificate required by law.

This Court stated as follows:

> "It is impossible to justify this statute of Iowa by classifying it as an inspection law. The right of the states to pass inspection laws is expressly recognized in article I, Sec. 10, Const., in the clause declaring that 'no state shall, without the consent of congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws.' • • • 'And all such laws shall be subject to the revision and control of the congress.' The nature and character of the inspection laws of the states, contemplated by this provision of the constitution, were very fully exhibited in the case of Turner v. Maryland, 107 U. S. 38, 2 Sup. Ct. Rep. 44. 'The object of inspection laws,' said Chief Justice Marshall in Gibbons v. Ogden, 9 Wheat. 1, 203, 'is to improve the quality of articles produced by the labor of a country, to fit them for exportation, or, it may be, for domestic use. They act upon the subject, before it becomes an article of foreign commerce, or of commerce among the states, and prepare it for that purpose.' They are confined to such particulars as in the estimation of the legislature, and according to the customs of trade, are deemed necessary to fit the inspected article for the market, by giving to the purchaser public assurance that the article is in that condition, and of that quality, which makes it merchantable, and fit for use or consumption. They are not founded on the idea that the things in respect to which inspection is required, are dangerous or noxious in themselves. As was said in

> Turner v. Maryland, 107 U. S. 38, 55, 2 Sup. Ct. Rep. 44, 58: 'Recognized elements of inspection laws have always been quality of the article, form, capacity, dimensions, and weight of package, mode of putting up, and marking and branding of various kinds; all these matters being supervised by a public officer having authority to pass or not pass the article as lawful merchandise, as it did or did not answer the prescribed requirements. It has never been regarded as necessary, and it is manifestly not necessary, that all of these elements should co-exist, in order to make a valid inspection law. Quality alone may be the subject of inspection, without other requirement, or the inspection may be made to extend to all of the above matters.' It has never been regarded as within the legitimate scope of inspection laws to forbid trade in respect to any known article of commerce, irrespective of its condition and quality, merely on account of its intrinsic nature, and the injurious consequences of its use or abuse."

This decision makes it clear that an inspection law does not apply to the presence of dangerous natural ingredients. The state can prohibit the sale of such merchandise, but it cannot charge fees for inspecting it. Inspection laws apply to products which can decompose or change, so as to make them unfit for use, such as foods.

Likewise it will be noted that Article I of the Constitution provides that the expense necessary for executing a state inspection law is to be derived by means of *duties* on merchandise coming within the state. This necessarily is the exact opposite of a fixed registration fee to be paid in advance upon each trade-mark or preparation, irrespective of the amount of such trade-marked preparation which is

brought within the state. The only constitutional manner in which a state can pay for the expense of executing a legitimate inspection law, is by means of a fee which based upon the amount of merchandise which is brought within the state.

Likewise, in *Vance* v. *W. A. Vandercook Co.*, 170 U. S. 438, it was attempted to uphold a South Carolina law which required the filing of a sample of liquor which was brought within the state, with an official chemist, prior to bringing in the liquor. This law was held void, because the South Carolina statute, like the Maine statute in issue, did not provide for inspection of the merchandise as it was brought into the state.

This Court stated:

> "But it is obvious that this argument is unsound, as the inspection of a sample sent out in advance is not in the slightest degree an inspection of the goods subsequently shipped into the state. The sample may be one thing, and the merchandise which thereafter comes in another. It is hence beyond reason to say that the law provides for an inspection of the goods shipped into the state from other states, when in fact it exacts no inspection whatever. Conceding, without deciding, the power of the state, where it has placed the control of the sale of all liquor within the state in charge of its own officers, to provide an inspection of liquors shipped into a state by residents of other states for use by residents within the state, it is clear that such a law, to be valid, must not substantially hamper or burden the constitutional right, on the one hand, to make, and, on the other, to receive, such shipment. A law of this nature must, at least, provide for some inspection of the article, to justify its being an inspection law."

The statute is unconstitutional because no attempt has been made to allocate the expense of enforcing the statute from the expense of administering other statutes of the state. Likewise no attempt has been made to allocate the expense of inspecting preparations made within the state, from the expense of inspecting preparations made outside of the state.

Findings of Fact Nos. 19, 20 and 22 are as follows (R. p. 57):

"19. Prior to the time of the hearing on the plaintiff's bill on June 24th, 1936, no attempt had been made by said Department of Health & Welfare to determine what portion of the time of these investigators or inspectors employed by said Department of Health & Welfare was spent in securing cosmetics for the purposes of analyses, in order to enforce said Chapter 109, and what portion of the time of these employees was devoted to other purposes.

20. Up to June 24, 1936, said Department of Health & Welfare had not designated any employee or employees for the sole purpose of visiting retail stores in the State of Maine, inspecting their stocks of cosmetic preparations, and picking up samples thereof for analysis, in order to enforce said Chapter 109.

22. No evidence was offered by the defendants to show what part of the fees collected under Chapter 109 has been expended prior to June 24, 1936, in enforcing said Chapter 109 relative to cosmetic preparations made within the State of Maine, as distinguished from the cosmetic preparations made outside of the State of Maine by plaintiff and other out-of-state manufacturers of cosmetic preparations."

Plaintiff took the testimony of Elmer W. Campbell, who is the Public Health officer in charge of this work. This witness testified that while certain investigators or inspectors had been directed to pick up cosmetics, no attempt had been made to determine what part of their time was devoted to other duties (R. p. 167, fol. 25). One of these employees spent all his time in visiting stores in order to ascertain the retailers of cosmetic preparations. Another agent made routine inspection of beauty parlors in order to see whether they were obeying a statute other than the one in issue (R. p. 168, fol. 254).

Hence it clearly appears from the record that the fees collected under this statute are being used to pay the expenses for enforcing another local statute and no attempt has been made to determine how much the state has spent in analyses and other expenses incident to the enforcement of the statute in issue, in connection with cosmetics manufactured *outside* of the state.

Cleveland Refining Co. v. *Phipps*, 277 Fed. 463, affirmed 261 U. S. 479.

The last-mentioned case involved an Ohio statute which provided for the inspection of petroleum, illuminating oils and the like. Part of the statute was constitutional because it provided for inspection fees which were based on the quantity of merchandise brought within the state, and such fees were paid by the local distributor (273 Fed. on p. 467).

The Court stated (277 Fed. pp. 466 and 467):

> "It is significant that the state has not, at any time, in the enforcement of the law, kept or endeavored to keep a separate record of interstate and intrastate shipments, or of the sums realized from their inspection,—" • • •

"In the light of Castle v. Mason, supra, and Foote v. Maryland, 232 U. S. 494, 34 Sup. Ct. 377, 58 L. Ed. 698, as well as of the express provisions of the act, such construction is correct, for the reason the statute does not contemplate a separation of interstate and intrastate shipments and contains no provisions for a separate record or accounting for the same, or from whom and where purchased, or from whence shipped, or any suggestion of a classification with reference to the character of the shipments. It applies generally to any and all kerosene, petroleum, and petroleum products, whether manufactured in this state or not, and whether shipped wholly within the state or from other states into this. Shipments of both classes, without discrimination or intent of separation, are subjected to the provisions of the act, are classified collectively with reference to the quantity only of fluids inspected, are charged with the same fees, and the commingled receipts arising from their inspection are required to be paid into the state treasury. The act, except as to the amount of fees charged for inspection, is in its essential details, and even in nearly all of the language employed, a re-enactment of the law declared unconstitutional in Castle v. Mason, supra, in which case it was found that such earlier act does not materially differ from the law declared void in Foote v. Maryland and that considered in Red C Oil Mfg. Co. v. Board of Agriculture, supra."

Defendants herein take the position that the plaintiff must prove affirmatively that the fees are in excess of the cost of administering this statute. Under the decisions of this Court cited in *Cleveland Refining Co.* v. *Phipps*, the

burden is primarily upon the state to maintain a system of records whereby this determination can be made. If the state commingles the expenses of administering this statute, with the expenses of administering other statutes, as in the instant case, it is impossible to determine whether or not the fees are reasonable.

Likewise Section 1 of the statute requires the inspection of the products of local manufacturers who operate beauty parlors and the like and who make up their own hair tonics and other cosmetic preparations.

Separate records must be kept of the expense of inspecting merchandise made within the state, in order to avoid placing an unfair burden on interstate commerce.

In the case of,

D. E. Foote & Co. Inc. v. *Stanley*, 232 U. S. 494,

this Court pointed out that where funds were thus commingled, the state could meet the presumption of invalidity,

> "by carrying the burden of showing that, while the statute required payment out of which joint fund, the collections were not sufficient, but only helped to pay the definitely ascertained expenses of inspection."

This Court further pointed out that while excess fees might be valid "as a tax on property in Maryland", said excess fees were,

> "a burden on interstate commerce when levied upon oysters coming from other states. This fact renders the whole tax void • • •."

The statute is unconstitutional because it delegates to an administrative body, the arbitrary and *ex parte* power to grant original certificates, to deny the renewal of original certificates, and to prohibit the sale of cosmetics even during the term of an original certificate or a renewal certificate. The right to review the refusal to grant an original certificate does not give any remedy, in view of the fact that the Department is not required to take any testimony or to render any opinion. The statute does not even purport to give the right to review a refusal of the Department to renew a certificate, and it does not purport to give the right to review the prohibition of the sale of a cosmetic by the Department during the term of an original certificate or of a renewal certificate.

We have previously pointed out (*supra* pp. 19-21) the unlimited *ex parte* power which is given to the Department, "in its judgment".

The Department of Health and Welfare is a branch of the Executive Department. The Commissioner of Health is appointed by the Governor, with the advice and consent of the Public Health Council, who are also appointed by the Governor. (Revised Statutes of Maine, 1930 Ed., pp. 447 and 448, *infra* p. 53.)

It is well settled, both under the Constitution of the United States, and under the Constitution of Maine, that the Legislature cannot delegate its authority to the Executive (*A. L. A. Schechter Poultry Corp.* v. *United States*, 295 U. S. 495; *Wichita Co.* v. *Public Utilities Commission*, 260 U. S. 48; *Cape Elizabeth* v. *Boyd*, 86 Me. 317; *State* v. *Butler*, 105 Me. 91).

The pertinent portion of the Constitution of Maine is as follows:

"ARTICLE III.

DISTRIBUTION OF POWERS.

"Sec. 1. The powers of this government shall be divided into three distinct departments, the Legislative, Executive and Judicial.

"Sec. 2. No person or persons, belonging to one of these departments, shall exercise any of the powers properly belonging to either of the others, except in the cases herein expressly directed or permitted."

In the case of,

State v. *Butler*, 105 Me. 91,

the Court cited with approval, the case of

Noel v. *The People*, 187 Illinois 587,

which is a leading case on this subject.

Section 8 of the Illinois act in issue was as follows (187 Ill. 590):

"The Board of Pharmacy may in their discretion issue permits to persons, firms or corporations engaged in business in villages or other localities, empowering them to sell the usual domestic remedies and proprietary medicines under such restrictions as the Board of Pharmacy may deem proper. Each applicant for this permit shall pay to said board the sum of one dollar before said permit shall issue. Said permit shall specifically state just what the holder thereof is allowed to sell."

The Court stated (pp. 591 and 592):

"It is manifest, that section 2 vests an arbitrary power in the Board of Pharmacy to say who shall,

and who shall not, sell the usual domestic and proprietary remedies in village and other localities, and just exactly what they are allowed to sell. Section 8 in no way regulates or controls the discretion vested thereby in the Board. The official discretion, conferred upon the board, is unregulated, and not subject to any permanent provisions operating generally and impartially. No conditions are prescribed, upon which the permit, authorizing the sale of the usual domestic remedies and proprietary medicines, is to be issued. A law which thus invests any board, or body of officials, with a discretion, which is purely arbitrary, and which may be exercised in the interest of a favored few, is invalid. It makes an unjust discrimination between persons coming within the same class. A person, firm or corporation engaged in business in a village or other locality may sell these domestic remedies and proprietary medicines if a permit is obtained from the Board of Pharmacy, provided such board sees fit in its discretion, and under such restrictions as it may deem proper, to issue such permit. The board is thus authorized to confer a privilege upon one person, firm or corporation, and to deny the same privilege to any other person, firm or corporation, and is not required to be governed, in doing so, by any fixed rules or regulations, but may be moved thereto only by its own caprice, or favoritism. Laws, thus conferring discretionary and arbitrary powers upon statutory officials, are not only invalid for the reasons already stated, but amount in effect to a delegation by the legislature of its legislative functions to the board of officials in question."

In the *"Schechter"* case, this Court pointed out that in providing for expert bodies to deal with certain problems, the

> "administrative agency, in dealing with particular cases, is required to act upon notice and hearing, and

its orders must be supported by findings of fact which in turn are supported by evidence" (295 U. S., p. 539).

"These standards established by Congress were to be enforced upon hearing and evidence by an administrative body acting under statutory restrictions adapted to the particular activity" (295 U. S., p. 540).

Numerous earlier cases have held that the rights of citizens cannot be left to executive officers, who can act without hearing.

Regal Drug Corporation v. *Wardell*, 260 U. S. 386.

The Court enjoined the collection of certain fines which had been levied by the Commissioner of Internal Revenue without notice or hearing.

Central Railway Co. v. *Wright*, 207 U. S. 127.

The tax laws of Georgia permitted *ex parte* valuation of the taxpayer's property, save where fraud or corruption was shown in the action of the assessing officer. This was held unconstitutional.

A similar ruling was made in a rate case in,

Chicago R. R. Co. v. *State of Minnesota*, 134 U. S. 418.

"No hearing is provided for; no summons or notice to the company • • • no opportunity provided for the company to introduce witnesses before the commission,—in fact nothing which has the semblance of the process of law."

United States v. *McMurtry*, 48 Fed. (2nd) 258, p. 260,

"No authority was given to the War Industries Board to impose penalties, nor could Congress dele-

gate to it such a matter. *United States* v. *Grimaud*, 220 U. S. 506, 31 S. Ct. 480, 55 L. Ed. 563; *United States* v. *Eaton*, 144 U. S. 677, 12 S. Ct. 764, 36 L. Ed. 591)."

The words "in its judgment" must have been inserted in Section 2 in order to make the *opinion* of the Department binding, if there was a fair difference of opinion between physicians as to the merits of a particular cosmetic. The statute goes even further, and it makes the opinion of the Department conclusive, even if it is contrary to the consensus of medical opinion.

Since the statute does not provide for a hearing before the Department, "judgment" is not equivalent to "decree".

One of the meanings of "judgment" is,

> "An opinion formed or put forth; a conclusion drawn from premises; a decision based on observation or belief; an estimate; a view" (The Century Dictionary and Encyclopedia, 1911 edition, Vol. 5, p. 3247).

The courts have repeatedly recognized the fact that medicine is not an exact science, and that there are conflicting schools of medicine.

> "The most liberal allowance should be made for difference of medical opinion" (Moxie Nerve Food Co. v. Modox Co., 152 Fed. 493, p. 505).

The test is "the weight of medical authority" (152 Fed. on p. 505).

> *Stune* v. *United States*, 27 Fed. (2nd) 575, C. C. A. 8th, p. 578,
>
> "Medicine is not an exact science."

It is difficult to conceive of a more arbitrary and unreasonable statute.

As stated in,

Panama Refining Co. v. *Ryan*, 293 U. S. 388, on p. 432:

> "If the citizen is to be punished for the crime of violating a legislative order of an executive officer, or of a board or commission, due process of law requires that it shall appear that the order is within the authority of the officer, board, or commission, and, if that authority depends on determinations of fact, those determinations must be shown. As the Court said in Wichita Railroad & Light Co. v. Public Utilities Commission, 260 U. S. 48, 59, 43 S. Ct. 51, 55, 67 L. Ed. 124: 'In creating such an administrative agency, the Legislature, to prevent its being a pure delegation of legislative power, must enjoin upon it a certain course of procedure and certain rules of decision in the performance of that function.' "

The statute in issue should have provided for the fundamental rights of notice, open hearing, the right to present testimony and to cross examine, and fair opportunity to comply with rulings. Likewise the statute should have required the recording of all testimony and proceedings, in order to furnish a basis for review. Retroactive rulings should not be permitted. If the Department refuses to renew a certificate, or if it prohibits the sale of merchandise during the term of a certificate, opportunity must be given to dispose of goods on hand.

In

E. Fougera & Company v. *City of New York*, 224 N. Y. 269,

an ordinance was passed prohibiting the sale of patent medicines, unless their principal ingredients were disclosed. The

ordinance did not exempt existing stocks of merchandise. This was held unconstitutional.

> "Without warning and without fault, its right of property has been forfeited. There must be many others in a like predicament. We do not need to say that there is no power even in the legislature to work this forfeiture. • • •
>
> The defect is so far reaching, it is so deeply wrought into the substance of the law, that there is no opportunity to sever the good from the bad."

Randall v. *Patch*, 118 Me. 303, page 305:

> "Notice and hearing are of the essence of due process of law • • •.
>
> An act that purports to authorize procedure depriving an owner of his property without opportunity for hearing and without notice violates both the Federal and State Constitutions."

In *Dunn* v. *Burleigh*, 62 Me. 24, on pages 36 and 37, it was held that in order to confiscate property,

> "something more is necessary than an ex parte determination and command of the land agent."
>
> *State* v. *Burdage*, 95 Wis. 390, 70 N. W. 347.

Under state law, the Board of Health was given the authority (italics ours)

> "to make such rules and regulations and to take such measures as may, *in its judgment*, be necessary for the protection of the people."

The Court held that this was void as being,

> "an absolute delegation of the legislative power."
>
> *Schaezlein* v. *Cabaniss*, 135 Cal. 466, 67 Pac. 655.

The statute provided that if factory work produced injurious gases or the like, the Commissioner of the Bureau of Labor was given the right to issue an order directing the use of an approved mechanical appliance for preventing the inhalation of the gas. A violation of the Act was made a misdemeanor. The statute did not provide for a hearing before the Commissioner.

The Court stated:

> "• • • it is an attempt to confer upon a single person the right to determine not only that the sanitary conditions of a workship or factory is not reasonably good, but to say whether, even if reasonably good, *in his judgment*, its condition could be improved by the use of such appliances as he may designate, and then to make a penal offense of the failure to install such appliances. 'The very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself' (Yick Wo v. Hopkins, 118 U. S. 356. • • •
>
> But the *judgment* of the commissioner is not only the determinative factor • • • but under this law is absolutely conclusive and binding" (italics ours).

A similar ruling was made in *Ex parte Peppers*, 189 Cal. 682, 209 Pac. 896, where the Director of Agriculture was given *ex parte* power to issue regulations for preventing the sale of citrus fruit which was,

> "frosted to the extent of endangering the reputation of the citrus industry."

As stated by the Circuit Court of Appeals in,

> *Butler* v. *U. S.*, 78 Fed. (2nd) 1, pages 8 and 9 (aff. 297 U. S. 1),

where powers have been held properly delegated, the delegated authority was purely ministerial,

> "or a power to determine, *after notice and hearing*, certain facts upon which the operation of congressional edicts are made to depend • • • and from the findings of which commission judicial review is provided for.
>
> The power to determine what the law shall be, what property shall be affected by taxation or regulation, *and what standards* shall govern the administrative officers in administering acts of Congress has never been held to be an administrative function."

The statute is void because it imposes an impossible standard of uniformity.

We have previously pointed out that the defendants will administer the statute in accordance with the opinion of the Attorney General (R. p. 39, fol. 73) which requires registration for each and every preparation "which differs from another preparation in color".

As stated previously (*supra*, pp. 23 and 24) it is impossible to produce cosmetic preparations with the uniformity required by this opinion.

Likewise, it is impossible to manufacture cosmetics precisely according to formula or sample.

It has been frequently held that a state cannot require a uniformity of manufacture which is impossible in actual commercial production, if such uniformity has no reasonable relation to the public health.

Burns Baking Co. v. *Bryan*, 264 U. S. 504;
Holsum Baking Co. v. *Green*, 45 Fed. (2nd) 238.

An injunction should be granted restraining the defendants from requiring separate registrations for preparations having formulas which are identical, save for the use of perfumes, and from otherwise exceeding their statutory power.

Since Section 3 of the statute expressly excludes perfumes, a perfume *per se* need not be registered.

Hence if a manufacturer makes the identical face powder in the unperfumed form, and also in the perfumed form, he should not be compelled to take out two registrations.

Likewise if a manufacturer sells the unperfumed face powder under one trade name, and he sells the perfumed face powder under a different trade name, he should not be compelled to take out two separate registrations.

The defendants have clearly gone beyond the scope of Section 3 of the statute, in requiring separate registrations according to differences in trade name, color, or odor as required by the rulings set forth on pages 39-41 of the Record. If a manufacturer puts out the same powder in a cheap box and in a fancy box, using two different trade names, the preparation is the same, and only a single fee should be required.

The statute is void because it provides for unreasonable searches and seizures and forfeitures.

It is well settled that proceedings in seizure and forfeiture come within the Fourth Amendment to the Constitution of the United States (*U. S.* v. *Eight Packages*, 5 Fed. (2nd) 971 on p. 976).

The Fourth Amendment and the Constitution of Maine (Article I, Sec. 5) protect citizens,

"from all unreasonable searches and seizures".

As stated in the case of *U. S.* v. *Eight Packages*, 5 Fed. (2nd) 971 on p. 976, a seizure cannot be made save on a verified warrant which must show probable cause.

The prohibition against unreasonable searches and seizures extends to places of business (*U. S.* v. *One Kemper Radio*, 8 Fed. Supp. 304).

Likewise a proceeding to forfeit property is within the protection of the Fourth and Fifth Amendments to the Constitution of the United States (*U. S.* v. *Fifty-eight Drums*, 38 Fed. (2nd) 1005 on p. 1007).

The Constitution of Maine (Article I, Sec. 6) gives the defendant the right to trial, "by a jury of the vicinity" in all criminal prosecutions "except in trials by martial law or impeachment". This corresponds generally to the Sixth Amendment to the Constitution of the United States.

For this reason the Federal Pure Food and Drug Act gives the right to a trial by jury in proceedings to condemn merchandise (U. S. Code, Title 21, Sec. 14).

Numerous decisions have held that merchandise cannot be condemned on land, as distinguished from a seizure on sea, without trial by jury (*The Sarah*, 8 Wheaton, 21 U. S. p. 390).

It has been held that a state, as well as the United States, cannot seize property,

> "without giving to its owner the trial by jury" (*The J. W. French*, 13 Fed. 916 on p. 924).
>
> *United States* v. *One Ford Sedan*, 297 Fed. 830, C. C. A. 5th.

It was held that an automobile which had been used in the concealment of intoxicating liquor could not be forfeited without trial by jury.

The Court cited a case under the Federal Pure Food & Drug Act.

Sections 5-7 of the Maine Act do not provide for a trial by jury. Section 5 permits a seizure of original packages, without a warrant. As previously pointed out, if the Department refuses to renew a registration, or if it prohibits the sale of a preparation during the term of a registration, no notice is required, and no time is given to dispose of stock on hand. At the hearing provided in Sections 6 and 7, no jury trial is provided and no defense can be interposed, save that the owner of the seized property intended to ship the merchandise out of the state, instead of keeping it "for unlawful use or sale in this State". The owner of the seized merchandise has no right, at any time, to attempt to prove that the seized merchandise was pure and harmless.

The obvious intent of the statute was to impose such drastic fines, penalties, and forfeitures as to prevent a test of the constitutionality of the statute.

The good-will of a manufacturer depends on continuous sales. If the "Bourjois" preparations are off the market in Maine for a month, the public will turn to competing merchandise, and plaintiff will find it very difficult to recover its trade. The Courts have repeatedly invalidated statutes in which the punishment was calculated to prevent a fair test of constitutionality.

Wadleigh R. R. Co. v. *State of Georgia*, 235 U. S. 651; *Oklahoma Co.* v. *Love*, 252 U. S. 331, p. 337.

The statute is void because Section 10 makes it a penal offense to violate "any ordinance, or by-law, or regulation made thereunder".

Section 2 authorizes the Department, "to make such regulations as may be necessary for carrying out the purpose of this act to safeguard the public health."

If an unreasonable regulation is adopted, no defense is permitted by Section 10.

No limitation is imposed upon *ordinances* and *by-laws*. These are left to the arbitrary power of the Department.

The Legislature cannot delegate the right to pass criminal laws to the executive. (*United States* v. *McMurtry*, 48 Fed. (2nd) 258, on p. 260; *Regal Corporation* v. *Wardell*, 260 U. S. 386.)

In proceedings brought to enforce the Maine law, there should be a showing of extrinsic facts, namely, that the ruling or regulation or ordinance or by-law was necessary to protect the public health. No proof can be offered as to these extrinsic facts, if there is a seizure and forfeiture under the Maine law.

No appeal or other method of review is provided, in order to test the validity of the ex parte ordinances, regulations, and by-laws.

Respectfully submitted,

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APPENDIX TO BRIEF.

CHAPTER 22:

Sec. 1. The state department of health as heretofore established shall consist of a commissioner of health and a public health council:

Sec. 3. The commissioner of health shall be appointed by the governor with the advice and consent of the council.

Sec. 4 provides that the public health council shall,

> "consist of a commissioner of health and five other members, • • • all of whom shall be appointed by the governor with the advice and consent of the council."